Kumpulan Wang Persaraan (Inc) v Meridian Asset Management Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22–1457 OF 2007
HAMID SULTAN J
8 MAY 2012

Tort — Vicarious liability — Whether employer — Employer's liability — Investment management agreement to provide professional investment advice and management services — Losses as result of employee's misappropriation of clients' monies — Whether employer responsible for conduct of employee on principle of vicarious liability — Shift of blame to custodian — Failure to check flow of fund

The plaintiff, a body corporate claimed against the defendant, a professional fund management company, for vicarious liability for the acts of the employee which resulted in losses to the former. The present claim stemmed when the plaintiff and the defendant entered into an investment management agreement ('the agreement') where the defendant agreed to provide professional investment advice and management services over the investment portfolio owned by the plaintiff ('the plaintiff's fund'). Arab Malaysian Trustee Berhad ('AM Trustee Bhd') was appointed as the custodian for the plaintiffs fund which amounted to a total of RM30,000,000. On 29 August 2005, the defendant's managing director ('Mr Ng Tiong Yee') made a police report, inter alia, that the defendant's employee ('the said employee') had committed a criminal offence; that the said employee had dealt with about RM28m belonging to two clients ie Malaysian Assurance Alliance Bhd ('MAA') and the plaintiff; and that the employee had confessed to remitting the defendant's client's monies totaling to RM28m which belonged to MAA and the plaintiff, to his own trading account; forging the defendant's managing director's signature; losing the bulk of the money in the futures market though OKACHI (crude oil) and TA Futures for palm oil trading. The total amount lost from the plaintiffs fund was RM7,254,050.42. Subsequently, the plaintiff terminated the defendant's services under the agreement. The defendant argued that it was not responsible on principle of vicarious liability for the conduct of its employee for any criminal act or fraud as the conduct of the said employee was beyond the control and authority of the defendant. The defendant also shifted the blame to the custodian who was not a party to the action notwithstanding the fact that they were obliged to make good the loss pursuant to cl 9.02 of the investment agreement. The defendant further submitted that the plaintiff wholly or partly contributed to the negligence of custodian as it was the

plaintiff who consented to the appointment of custodian, and then failed to check the flow of the fund.

Held, allowing the claim with costs of RM75,000:

(1) The defendant's argument that they were not liable for the conduct of their employees for any criminal act or fraud of the said employee beyond the control and authority of the defendant would not apply. If there was proper check and balance, the incident could have been avoided. The plaintiff's argument that on the factual matrix of the instant case the defendant was liable on the principle of vicarious liability had merit. A professional fund manager, such as the defendant, had greater duty and responsibility and could not easily hide behind the criminal acts of the employee when it involved direct or indirectly, the funds of clients (see para 8(a)–(c)).

(2) The argument of learned counsel for the defendant on contributory negligence was misconceived. The mere appointment of the custodian could not be a subject matter of contributory negligence. The allegation that the plaintiff failed to check the flow of funds must truly be seen to be a mischievous argument when the evidence was that the plaintiff could not have checked the flow as the facts, figures, and instructions would only be with the defendant and only the defendant would have the information to do so (see para 8(d)).

(3) This was a fit and proper case to award pre-judgment interest as submitted and post-judgment interest to be limited to 4%pa as per the rules of court. The plaintiff's claim was allowed and the defendant was ordered to pay the plaintiff costs in the sum of RM75,000. The plaintiff was to pay allocatur fees before the extraction of order for costs, and the deputy registrar to issue certificate for the allocator (see para 8(g) & 9).

[Bahasa Malaysia summary

Plaintif, badan korporat menuntut terhadap defendan, syarikat pengurusan dana profesional, untuk liabiliti vikarius untuk tindakan-tindakan pekerja yang menyebabkan kerugian kepada plaintif. Tuntutan ini berpunca apabila plaintif dan defendan memasuki perjanjian pengurusan pelaburan ('perjanjian') di mana defendan bersetuju untuk memberikan nasihat pelaburan profesional dan khidmat pengurusan ke atas portfolio pelaburan yang dimiliki oleh plaintif ('dana plaintif'). Arab Malaysian Trustee Berhad ('AM Trustee Bhd') dilantik sebagai penjaga dana untuk dana plaintif yang mana berjumlah sebanyak RM30,000,000. Pada 29 Ogos 2005, pengarah pengurusan defendan ('Mr Ng Tiong Yee') membuat laporan polis, antara lain, bahawa pekerja defendan ('pekerja tersebut') telah melakukan kesalahan jenayah; bahawa pekerja tersebut telah mengendalikan lebih kurang RM28 juta kepunyaan dua pelanggan iaitu Malaysian Assurance Alliance Bhd

('MAA') dan plaintif; dan bahawa pekerja tersebut telah mengaku meremit wang pelanggan defendan sebanyak RM28 juta dimiliki oleh MAA dan plaintif, kepada akaun perniagaannya sendiri; memalsukan tandatangan pengarah pengurusan defendan; kehilangan sebahagian besar wang di dalam pasaran niaga hadapan walaupun OKACHI (minyak mentah) dan TA Futures untuk perniagaan minyak sawit. Jumlah kerugian keseluruhan dari dana plaintif adalah RM7,254,050.42. Plaintif kemudiannya menamatkan khidmat defendan di bawah perjanjian tersebut. Defendan berhujah bahawa ia tidak bertanggungjawab atas prinsip liabiliti vikarius untuk tingkah laku pekerjanya untuk apa-apa tindakan jenayah atau penipuan seperti yang dilakukan oleh pekerja tersebut adalah melampaui kawalan dan kuasa defendan. Defendan juga mengalihkan kesalahan tersebut kepada penjaga dana yang bukan pihak kepada tindakan walaupun fakta bahawa mereka bertanggungjawab untuk membayar kerugian tersebut berikutan klausa 9.02 perjanjian pelaburan. Defendan selanjutnya berhujah bahawa plaintif secara keseluruhannya atau sebahagiannya menyumbang kepada kecuaian penjaga dana kerana plaintif yang bersetuju kepada pelantikan penjaga dana, dan kemudiannnya gagal untuk memeriksa aliran dana tersebut.

Diputuskan, membenarkan tuntutan dengan kos sebanyak RM75,000:

(1) Hujahan defendan bahawa mereka tidak bertanggungjawab untuk tingkah laku pekerja-pekerja mereka untuk apa-apa tindakan jenayah atau penipuan oleh pekerja tersebut melampaui jagaan dan kuasa defendan tidak boleh diguna pakai. Jika terdapat pemeriksaan yang betul, kejadian tersebut boleh dihalang. Hujahan plaintif bahawa atas fakta matriks kes ini defendan bertanggungjawab atas prinsip liabiliti vikarius mempunyai merit. Pengurus dana profesional, seperti defendan, mempunyai tugas dan tanggungjawab yang besar dan tidak dapat dengan mudah berlindung dibelakang tindakan jenayah pekerja apabila ia melibatkan secara terus atau tidak, dana pelanggan-pelanggan (lihat perenggan 8(a)-(c)).

(2) Hujahan peguambela yang bijaksana bagi pihak defendan atas kecuaian bersama adalah salah tanggap. Hanya pelantikan penjaga dana tidak boleh menjadi perkara kecuaian bersama. Dakwaan bahawa plaintif gagal untuk memeriksa aliran dana mesti dilihat sebagai hujahan berniat jahat apabila keterangan bahawa plaintif tidak dapat memeriksa aliran tersebut memandangkan fakta, jumlah dan arahan-arahan hanya berada dengan defendan dan hanya defendan yang mempunyai maklumat untuk berbuat sedemikian (lihat perenggan 8(d)).

(3) Kes ini adalah kes betul untuk mengawardkan faedah pra penghakiman seperti yang dikemukakan dan faedah pasca penghakiman terhad kepada 4% setahun mengikut kaedah-kaedah mahkamah. Tuntutan plaintif dibenarkan dan defendan diperintahkan untuk membayar plaintif kos

berjumlah RM75,000. Plaintif dikehendaki membayar fi *allocatur* sebelum pengekstrakan perintah untuk kos, dan timbalan pendaftar dikehendaki mengeluarkan sijil *allocatur* (lihat perenggan 8(g) & 9).]

Notes

For a case on whether employer, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) para 2084.

Cases referred to

Balakrishnan a/l Kaliannan v Ritz Garden Hotel (Cameron Highlands) Sdn Bhd [2011] 3 MLJ 721; [2011] 3 CLJ 854, CA (refd)

Bartlett and Others v Barclays Bank Trust Co Ltd [1980] 1 All ER 139, Ch D (refd)

Caswell v Powell Duffryn Associated Collieries Ltd [1939] 3 All ER 722, HL (refd)

Chien Tham Kong v Excellent Strategy Sdn Bhd [2009] 7 MLJ 261, HC (refd)

Credit Lyonnais Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department [1999] 1 All ER 929, HL (refd)

Green v Russel [1959] 2 All ER 525, CA (refd)

Lau Piang Ngong v Ang Koon Kau & Anor [1984] 2 CLJ (Rep) 137, HC (refd)

Lim Guan Eng v Utusan Melayu (M) Bhd [2012] 2 MLJ 394, HC (refd)

London, Chatham & Dover Rly Co v South Eastern Rly Co [1893] AC 429, HL (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsoir (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubair bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties) [2012] 9 MLJ 464, HC (refd)

Sukatno v Lee Seng Kee [2009] 3 MLJ 306, CA (refd)

Tropical Network Sdn Bhd v Geo-Chem Inspection (M) Sdn Bhd (FIMA Bulking Services Bhd, third party) [2011] 8 MLJ 359, HC (refd)

Voon Jan Choo v Lee Chie Siang & Anor [2007] 7 MLJ 77, HC (refd)

Waghorn v George Wimpey & Co Ltd [1970] 1 All ER 474, QBD (refd)

Yuen Kun-yue and Others v Attorney General of Hong Kong [1987] 2 All ER 705, PC (refd)

Legislation referred to

Civil Law Act 1956 s 11

Porres Royan (David Mathew with him) (Shook Lin & Bok) for the plaintiff.

Leslie Bala (Sivapakiam Krishnan and Radin Amir Afifi with him) (Othman Hashim & Co) for the defendant.

Hamid Sultan J:

[1] This is my judgment in respect of the plaintiff's claim against the defendant (investment manager) for vicarious liability for the acts of the employee which resulted loss to the plaintiff. The plaintiff's prayers read as follows:

Wherefore, the Plaintiff claims:-

(a) RM7,254,050.42 ('the said sum');

(b) Interest on the said sum from the date of the misappropriation of the said sum to the date of judgment at such rate as may be determined;

(c) An order that the Defendant do account for all or any profits that it has obtained by reason of the breach of the Agreement or the breach of his duty as trustee of the said sum;

(d) General damages for breach of the terms of the Investment Management Agreement;

(e) General damages for breach of duty as a trustee;

(f) Interest at 8% per annum from the date of judgment until the judgment is satisfied in respect of all monies ordered to be paid by the Defendant to the Plaintiff;

(g) Costs; and

(h) Further and/or other relief as this Honourable Court deems fit and proper to grant.

[2] It must be noted that the agreed facts with the admissions therein show the material facts relating to quantum and liability is not in dispute save to the defence to the claim. The statement of agreed facts in encl 29 reads as follows:

(1) The Plaintiff is a body corporate established under the Retirement Fund Act 2007

(2) The Defendant is a professional fund management company registered in Malaysia

(3) The Plaintiff and Defendant entered into an Investment Management Agreement dated 27.11.2001 ('the Agreement')

(4) Pursuant to the Agreement and subject to the terms and conditions thereunder, the Defendant agreed to provide professional investment advice and management services over the investment portfolio owned by the Plaintiff ('the Plaintiffs Fund')

(5) Pursuant to the Agreement and subject to the terms and conditions thereunder, Arab Malaysian Trustee Berhad ('AM Trustee Bhd') was appointed as the Custodian for the Plaintiffs Fund

(6) The total amount of the Plaintiffs Fund was RM30,000,000

(7) On 29.8.2005, the Defendant's Managing Director (Mr. Ng Tiong Yee) made a police report, inter alia, as follows:-

(1) that the Defendant's employee, one Mr. Ong Kheng Hoe ('the said Employee') had committed a criminal offence;

(2) that the said Employee had dealt with about RM28million belonging to two (2) clients i.e. Malaysian Assurance Alliance Berhad ('MAA') and the Plaintiff; and

(3) that the Employee had confessed to the following:-

(a) that he had remitted the Defendant's client's monies totalling RM28million (belonging to MAA and the Plaintiff) to his own trading account at TA Futures

(b) that he had forged the Defendant's Managing Director's signature by cutting and pasting and using the Defendant Company's letterhead to transfer the funds from AM Trustee

(c) that he had lost the bulk of the money (around RM25million) in the futures market though OKACHI (crude oil) and TA Futures for palm oil trading

(8) By way of letter dated 30.8.2005, the Defendant informed the Plaintiff in writing, inter alia, as follows:-

(1) that the Defendant had made a police report on 29.8.2005 regarding misappropriation of its client's funds; and

(2) that the said misappropriation will have some adverse effect on the Plaintiffs Fund

(9) By way of letter dated 6.9.2005, the Defendant informed the Plaintiff in writing, inter alia, as follows:-

(1) that the Defendant had discovered some financial misfeasance commited against the Defendant;

(2) that sometime in mid-August, the Defendant had discovered that deposits had been placed with Amanah Short Deposits without proper authorisation;

(3) that the total amount concerned is approximately RM28million which involves two major clients, which includes the Plaintiff; and

(4) that the Defendant's exposure due to the financial misfeasance was approximately RM7.25million

(10) The total amount lost from the Plaintiffs Fund due to the misappropriation / financial misfeasance was RM7,254,050.42.

(11) By letter dated 30.9.2005, the Plaintiff terminated the Defendant's services under the Agreement.

[3] The parties have relied on the following cases: *Bartlett and Others v Barclays Bank Trust Co Ltd* [1980] 1 All ER 139; *London, Chatham & Dover Rly Co v South Eastern Rly Co* [1893] AC 429; *Balakrishnan a/l Kaliannan v Ritz Garden Hotel (Cameron Highlands) Sdn Bhd* [2011] 3 MLJ 721; [2011] 3 CLJ 854; *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; *Yuen Kun-yue and Others v Attorney General of Hong Kong* [1987] 2 All ER 705; *Tropical Network Sdn Bhd v Geo-Chem Inspection (M) Sdn Bhd (FIMA Bulking Services Bhd, third party)* [2011] 8 MLJ 359; *Chien Tham Kong v Excellent Strategy Sdn Bhd* [2009] 7 MLJ 261; *Lau Piang Ngong v Ang Koon Kau & Anor* [1984] 2 CLJ (Rep) 137; *Waghorn v George Wimpey & Co Ltd* [1970] 1 All ER 474; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsoir (M) Sdn Bhd* [2010] 6 MLJ 1 ; [2010] 8 CLJ 629; *Sukatno v Lee Seng Kee* [2009] 3 MLJ 306; *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 All ER 722; *Voon Jan Choo v Lee Chie Siang & Anor* [2007] 7 MLJ 77; *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 MLJ 394; *Credit Lyonnais Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department* [1999] 1 All ER 929; *Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubair bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)* [2012] 9 MLJ 464; [2012] MLJU 189; *Green v Russel* [1959] 2 All ER 525.

BRIEF FACTS

[4] The brief facts of the case are reflected in the agreed facts above and also in encls 26–27 and 35. It is the contention of the defendant that the defendant is not responsible on principle of vicarious liability for the conduct of its employee for any criminal act or fraud as the conduct of the said employee is beyond the control and authority of the defendant.

[5] The defendant also shifts the blame to the custodian who is not a party to the action notwithstanding the fact that they are obliged to make good the loss pursuant to cl 9.02 of the investment agreement which reads as follows:

> In addition to and without prejudice to the rights, power and remedies herein conferred upon the KWAP, the Investment Manager shall indemnify and keep the KWAP indemnified against any loss, costs, claim fees (including Legal fees on a solicitor client basis in the event of a Court Action) and expenses incurred in the enforcement of this Agreement, arising from and or at the account of an or in respect of the breach of any of the terms of this Agreement, or professional negligence by the Investment manager in the performance of their duties and the Investment manager shall indemnify the KWAP within seven (7) days of the KWAP making such a demand.

[6] The defendant also says the plaintiff is wholly or partly contributed to the negligence of custodian on the ground that it was the plaintiff who consented

to the appointment of custodian, and the plaintiff failed to check the flow of the fund.

PRELIMINARIES

[7] One witness gave evidence for the plaintiff and one witness gave evidence for the defendant. As I said earlier, the primary facts are not in dispute and the plaintiff's evidence was consistent with the contractual terms. I cannot say the same for the evidence of the defendant. In the instant case the plaintiff has clearly established that there was no lack of internal check and balance system within the defendant. It must be noted that in the instant case a proper internal check and balance is essential and necessary to ensure the defendant's clients' interest (inclusive of the plaintiff) is protected in the ordinary course of business as well as to their role as a professional fund manager. This is so because the manner which the defendant can instruct the custodian is so precarious and it can be easily abused by not only the employees but also third parties. That is to say the instructions can be easily forged etc. In the instant case, this is what happened. The said custodian agreement cl 13 reads as follows:

> 13 INSTRUCTIONS
>
> The Custodian is hereby irrevocably and unconditionally authorised by the Company to honour and act without any reservation and without in anyway being obliged to do so:-
>
> on any instruction request or authority in writing including telex, facsimile or cable purporting to be signed, transmitted or sent by the Company or any other person(s) on the Company's behalf addressed to any authorised officer, employee or person acting on behalf of the Custodian who shall not be liable for so acting on the Company's behalf which the Custodian shall have accepted in good faith notwithstanding that it shall subsequently be shown or discovered that the instructions, request or authority was not correct or authentic or duly authorised. The Custodian is entitled to assume mat any instruction received by the Custodian is genuine and shall be under no duty to make enquiries to ensure that the instruction is in fact genuine and the Custodian shall not be liable whatsoever for the implementation of instructions which the Custodian accepts in good faith and for any loss to the Company directly or indirectly resulting from any act or omission to act on instructions given or purported to be given.

[8] I have heard the evidence, read the documents and submission of the parties in detail. Learned counsel have addressed the relevant issues, facts, law, contradiction and admission etc in detail. It will serve no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned counsel for the defendant, I take the

view that the plaintiff's claim must be allowed. My reasons, inter alia, are as follows:

(a) the defendant's argument that they are not liable for the conduct of their employees for any criminal act or fraud of the said employee beyond the control and authority of the defendant will not apply in the instant case. In addition, if there was proper check and balance, the incident could have been avoided;

(b) the plaintiff's argument that on the factual matrix of the instant case the defendant is liable on the principle of vicarious liability has merit. Support for the proposition can be found in a number of cases. In *Dubai Aluminium Co Ltd v Salaam and others* Lord Millet had this to say:

> [it is] no answer to a claim against the employer to say that the employee was guilty of intentional wrong doing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty … vicarious liability is not necessarily defeated if the employee acted for his own benefit …
>
> The vicarious liability of an employer does not depend upon the employee's authority to do the particular act which constitutes the wrong …

(c) in addition I must say professional fund manager, such as the defendant, has a greater duty and responsibility and cannot easily hide behind the criminal acts of the employee when it involves direct or indirectly the funds of clients. In *Barlett and others v Barclays Bank Trust Co Ltd* Birghtman J had this to say:

> I am of opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management … and in any event I would take judicial notice of that fact. Having expressed my view of the higher duty required from a trust corporation, I should add that the bank's counsel did not dispute the proposition.

(d) the cases which the defendant relied have no relevance to the facts of the instant case and had been adequately dealt by learned counsel for the plaintiff in the respective submission. In addition the argument of learned counsel for the defendant on contributory negligence is misconceived. The mere appointment of the custodian cannot be a subject matter of contributory negligence. In addition the allegation that the plaintiff failed to check the flow of funds must truly be seen to be a mischievous argument when the evidence was that the plaintiff could not have checked the flow as the facts, figures, instructions etc will only be with the defendant and only the defendant will have the information to do so;

(e) it is my finding that the plaintiff has established the case according to law

in respect of liability as well as quantum. On the issue of interests learned counsel for the plaintiff says that the pre-judgment interest should be at 13.67%pa as pleaded in para 25(b) of the statement of claim, and relies on s 11 of the Civil Law Act 1956 and the following cases namely:

(i) *London, Chatham & Dover Rly Co v South Eastern Rly Co* where the court observed as follows:

> But, my Lords, the appellants contended that even although they might not under the terms of Lord Tenterden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of their debt. I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; and for this reason, that I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not injustice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events.

(ii) in *Balakrishnan a/l Kaliannan v Ritz Garden Hotel (Cameron Highlands) Sdn Bhd* the Court of Appeal had this to say:

> Besides the aforementioned subsidiary legislation there is also s 11 of the Civil Law Act 1956, which explicitly vests discretionary power on the court to award interests in respect of recovery of debt and damages by a party. Clearly, under that provision the court may, if it thinks fit, order that an interest be included in the sum for which judgment is given as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

(f) I have taken note that the defendant has not taken issue in the defence or submission on the issue of interest. In addition, learned counsel for the plaintiff says:

> It is submitted that this is an eminently suitable case for this Honourable Court to grant pre-judgment interest as the Plaintiff has been wrongfully kept out of its money for more than seven years.
>
> It is also important to note that the Plaintiff in this case is not a private company that operates only for profit. On the contrary, the Plaintiff was actually set up for the wholly public purpose of funding the pension liabilities, gratuities and other retirement benefits for public servants and pensionable employees of statutory bodies and local authorities.

We would therefore submit that it would be in the interests of justice for this court to exercise its discretion to award pre-judgment interest. We therefore pray that interest at 13.67% per annum should be awarded on the sum of RM7,254,050.42 from 18.4.2005 to the date of judgment.

(g) This is a fit and proper case to award pre-judgment interest as submitted and post-judgment interest to be limited to 4%pa as per the rules of court.

[9] For reasons stated above, I allow the plaintiff's claim as prayed. The defendant to pay the plaintiff costs in the sum of RM75,000. The plaintiff to pay allocatur fees before the extraction of order for costs, and the deputy registrar to issue certificate for the allocatur.

[10] I hereby order so.

Claim allowed with costs of RM75,000.

Reported by Afiq Mohamad Noor